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No. 07-719

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In The

Supreme Court of the United States

TALK AMERICA INC.,

Petitioner,

v.

JOE DOUGLAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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I. INTRODUCTION[1]

Respectfully, Respondent Douglas misses the point of Talk America's petition for writ of certiorari. In direct conflict with this Court's precedent and in violation of the office of mandamus, the Ninth Circuit has created a new paradigm and evidentiary standard for arbitration agreements that creates a Hobson's choice for district courts that can only be resolved by an order denying arbitration.

Very recent decisional law from the United States Courts of Appeals for the Third and Ninth Circuits also provides further evidence of a split of authority concerning enforcement of class action waivers in arbitration agreements. Talk America respectfully submits this Court should grant its petition and resolve the important questions presented in this appeal.

II. ARGUMENT

Douglas argues the "Best Evidence Rule ha[s] no bearing on [the Ninth Circuit's] ruling" because "Douglas was not seeking to prove – and the Ninth Circuit's ruling did not enforce – the terms and conditions of any particular CSA that existed before Talk America's 2005 CSA" (Douglas Brief at 12). Douglas' argument is mistaken.

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[1] Terms defined in Talk America's Petition for Certiorari are used herein. "Douglas Brief at __" refers to the Brief in Opposition filed by Douglas.

Douglas admits he and Talk America entered into a "written telephone service contract" (ER0011). Indeed, Douglas specifically pled a "Breach of Written Contract" claim (ER0011-12). Talk America properly submitted the Consumer Services Agreements ("CSA") between Douglas and Talk America to the district court (ER0143-63). Douglas did not offer any contrary written agreement or ask the district court for leave to locate any such contract.

Instead, Douglas *orally recalled* a "long distance service agreement" he signed allegedly containing different terms than the CSA (ER 0121). Because the district court had only the CSA before it and since there was no request by Douglas for leave to locate any other agreement, the district court had no choice or ability to make any comparison with any other written agreement and thus properly compelled arbitration under the CSA.

Contrary to Douglas' suggestion, the district court could find for Douglas only if it accepted Douglas' *recollection* of terms of a written agreement not before the district court. This conclusion violates the Best Evidence Rule and, more importantly, create a special rule for arbitration agreements not applied in a non-arbitration context. The Ninth Circuit's contention the district court erred for failing to find a "*change*" in the terms of the written agreements between the parties is, respectfully, without any factual or legal basis and contrary to the policy favoring arbitration pronounced by this Court.

Further contrary to Douglas' contention, Talk America did not invent the argument that the Ninth Circuit created a new procedure for determining arbitrability (Douglas Brief at 19). The Ninth Circuit's words prove it themselves. The Ninth Circuit stated the determination of whether an arbitration provision should be enforced "depends on the facts and circumstances developed *during the course* of litigation" (App. 8) (emphasis added). Thus, under the rule announced by the Ninth Circuit, any district court faced with whether to compel arbitration of a written agreement when a plaintiff *orally* claims – without proof or seeking leave to produce a different agreement – the written agreement before the district court is different or "change[d]" from the one plaintiff *remembered*, the district court will have no choice but to deny the request for arbitration.

Talk America respectfully submits the Ninth Circuit's new rule makes poor policy. There is no reason to delay arbitrability decisions or to encourage plaintiffs to withhold written agreements in order to continue with litigation and avoid arbitration. Failing to impose a requirement upon a plaintiff to produce a contrary written agreement, if such exists, after a motion to compel arbitration is filed as the Ninth Circuit has done here is at odds with well-established jurisprudence of this Court to move "arbitrable dispute[s] out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp. Mercury Constr. Corp.* 460 U.S. 1, 22 (1983).

A. Further Evidence of a Circuit Split

The Ninth Circuit's antagonism to arbitration clauses has continued unabated with its recent decision in *Lowden v. T-Mobile USA, Inc.*, No. 06-35395 (9th Cir. January 22, 2008) striking down a class action waiver provision under Washington law. Notably, the Ninth Circuit acknowledged it was "declin[ing] . . . to follow the Third Circuit's holding" in *Gay v. CreditInform*, No. 06-4036 (3rd Cir., Dec. 19, 2007).

Contrary to the Ninth Circuit, the Third Circuit in *Gay* rejected and refused to follow two Pennsylvania Superior Court decisions holding arbitration provisions prohibiting class arbitration are unconscionable "if there are facts showing that the costs associated with individual versus class-based litigation of their claim against the defendant would result in continuing immunity for the defendant for its wrongful acts." *Id.* at *19 (ellipses and brackets omitted).[2] Stated another way, the Third Circuit properly rejected the same reasoning advanced by Douglas and applied by the Ninth Circuit in this and

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[2] In *Lowden*, while the Ninth Circuit purported to distinguish *Gay* on the ground California and Washington law would find unconscionable only a provision in which "the potential for individual gain is small, [and] few if any plaintiffs will pursue either individual arbitration *or* litigation, thereby greatly reducing the aggregate liability a company faces when it has exacted small sums from millions," *id.* at 854 (emphasis added), Talk America respectfully submits this is a distinction without a difference.

other analogous cases. *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976 (9th Cir. 2007); *Lowden v. T-Mobile USA, Inc.*, No. 06-35395 (9th Cir., January 22, 2008).

Relying on this Court's decision in *Perry v. Thomas*, 482 U.S. 483 (1987), the Third Circuit rejected the argument that "the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract" because, as the Third Circuit noted, such an argument is not "based 'upon such grounds as exist at law or in equity for the revocation of *any* contract' pursuant to Section 2 of the FAA, and therefore cannot prevent the enforcement of the arbitration provision." *Id.* at *20. The Third Circuit further noted "though the Pennsylvania [cases and Talk America contends the Ninth Circuit's opinion] are written ostensibly to apply general principles of contract law, they hold that an agreement to arbitration may be unconscionable simply because it is an agreement to arbitrate. A finding that the arbitration provisions in those cases are unconscionable can be reached only by parsing the provisions themselves to determine what they provide." *Id.* at *20.

The foregoing decisions only further demonstrate the deep division between the various courts of appeal and state supreme courts regarding the enforcement of class action waivers in arbitration contracts and thus provide a separate and important basis for this Court to grant Talk America's petition.

III. CONCLUSION

For the reasons set forth herein, Talk America respectfully requests this Court grant its petition for a writ of certiorari and hear this appeal.

Dated this 15th day of February, 2008

Respectfully submitted,

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